Musyoki v Jiwani Impex Ltd (Civil Appeal E135 of 2021)
[2023] KEHC 21074 (KLR) (17 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21074 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E135 OF 2021

DKN MAGARE, J

JULY 17, 2023

BETWEEN

RAPHAEL MUSEMBI MUSYOKI ..... APPELLANT

AND

JIWANI IMPEX LTD ..... RESPONDENT

JUDGMENT

1. This appeal is in respect of an Appeal from the Honurable Adalo from Marikani PMCC No E014 of 2020. In the natural order of things this file ought to have been filed in the High Court in Malindi. I noted the error after writing the Judgment and noted the futility of Returning the file to be handled in Malindi.

2. I gave directions on April 26, 2023. However, on March 24, 2023 Chief Justice gave directions that cases pending before the Court but filed after the Supreme Court decision shall proceed before the director of occupational Health Services.

The duty of the first Appellate Court

3. This being a first appeal, this Court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

4. In the case of *Mbogo and Another vs Shah [1968] EA 93* where the Court stated:

> ' That this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take

into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.'

5. The duty of the 1st Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others [1968]EA 123*, where the law looks in their usual gusto, held by as follows;-

> ' An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.'

6. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

7. In the case of *Peters vs Sunday Post Limited [1985] EA 424*, court therein rendered itself as follows:-

> ' It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses. But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion.'

8. The primary suit was filed as E014 of 2020 in the year of 2020. The Supreme Court made a decision on December 3, 2010 confirming that the Sections of the Workers' Injuries Benefits Act (WIBA) was in accordance and conforming with the *Constitution*.

9. Section 87 of the *Employment Act* states as follows:-

> ' 87. Complaint and jurisdiction in cases of dispute between employers and employees
>
> (1) Subject to the provisions of this Act whenever—
>
> (a) An employer or employee neglects or refuses to fulfil a contract of service; or
>
> (b) Any question, difference or dispute arises as to the rights or liabilities of either party; or (c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.
>
> (2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).
>
> (3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute

10. The question raised is whether, Appellants suit, was a worker's injury Benefit matter or not. Though the Appellant states that the issue of turn boy is an issue of fact.

11. The Court is not involved in the finding of fact as the suit was heard on a preliminary objection. In hearing a preliminary objection, this court and the court below have the same jurisdiction. They proceed on an understanding that what is pleaded in the plaint is true. It is what the English common law used to call a demurrer. The locus classicus case of *Mukisa Biscuit Manufacturing Co Ltd V West End Distributors Ltd [1969] EA 696*, made this pertinent observation. It said: -

> ' The first matter relates to the increasing practice o f raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop'.

12. In a Tanzanian case of *Hammers Incorporation Co Ltd Versus The Board Of Trustees of the Cashew nut Industry Development Trust Fund*, where the Court of Appeal, (Rutakangwa, NP Kimaro and SS Kadage JJA), sitting in Dar es salaam in their decision given on September 17, 2015 regretted that the practice of raising preliminary objection that was frowned upon by the court of appeal in Kampala in the Mukisa biscuit case(Supra) still persists. They stated as doth: -

> ' It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the 'improper practice' never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in Karata Ernest & Others V The Attorney General, Civil Revision No 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the MUKISA BISCUIT case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate.'

13. In the case of *Martha Akinyi Migwambo v Susan Ongoro Ogenda [2022] eKLR*, justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in Mukisa Biscuit Manufacturing Co. Ltd(supra): -

> ' A preliminary objection must be on a point of law. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd [1969) EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:
>
> > 'A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.'
>
> At page701 paragraph B-C Sir Charles Newbold, P added the following:
>
> > 'A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.'

14. A Tanzania Court of Appeal sitting in Dar es Salaam, in *Karata Ernest & Others vs Attorney General (Civil Revision No 10 of 2020) [2010] TZCA 30 (29 December 2010)*, (Luanda, JA, Ramadhani, CJ, Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

> ' At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only 'consists o f a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the 'normal manner' when deliberating on the merits or otherwise of the concerned legal proceedings.

15. Justice prof JB Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of *Oraro vs Mbaja [2005] eKLR*:

> ' I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.'

16. It is therefore my view that a preliminary objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or fats requiring further enquiry. In determining a preliminary objection therefore only 3 documents are required in addition to the *Constitution*. The impugned law, the plaint and preliminary objection. If you have to refer to the defence, then the preliminary objection is untenable

17. The matter proceeds as if the plaintiff's pleadings are correct. After admitting being a turn boy, the appellant cannot change his mind and prove otherwise. Section 62 of the *Evidence Act* states as doth: -

18. I have read the proceeding's and come to an inevitable conclusion that the Appellant wsa a turn boy working for the defendant. The injuries are stated to have occurred in the Respondent's motor vehicle Registration No KAT xxx ZC xxx Mercedes Benz Actros.

19. The plaintiff cannot by his pleadings craft or maturation create or take away jurisdiction.

20. The parties submission confirm this position. In the end, it is clear that the plaintiff was injured while on duty. Pursuant to paragraph 8 of the Chief Justice's directions, that matter shall proceed before the Director under the workers Injuries Benefit Act.

21. I find no merit in the Appeal.

Determination

22. I consequently dismiss the entire appeal for lack of merit with costs of Kshs 40,000 to the 1st Respondent.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 17TH DAY OF JULY,2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ajigo for Respondent

No appearance for the Appellant

Court Assistant - Brian